No. 13,014

IN THE

United States Court of Appeals

For the Ninth Circuit

HENRY T. TANIMURA,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

REPLY BRIEF OF APPELLANT.

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SUMMARY OF STATEMENT OF THE CASE.

Both statements of the case are in accord on all matters which affect the issue here involved. However, appellant would like again to point out that the judgment of the lower Court in awarding appellee $1,677.50 (T.R. 32) under Section 205 of the Housing and Rent Act of 1947 in effect penalized appellant by making him pay twice the amount of all alleged overcharges occurring within the one year prior to the commencement of the action. Appellant was not only required to reimburse the tenants for all alleged overcharges (T.R. 31) which they had paid but appellant was also required to pay a like sum to appellee.

SUMMARY OF THE ARGUMENT.

As appellee did not discuss the points and most of the authorities set forth in appellant's opening brief, appellant will discuss appellee's points and authorities in the order as set forth in appellee's brief. Before doing so appellant notes that appellee did not cite one decision by any federal appellate court denying to a litigant a trial by jury in a civil action involving a penalty.

I.

Appellee's first point is that even if appellant was entitled to a jury trial, denial of the same was not reversible error. Two decisions are cited by appellee to sustain this position.

Orenstein v. United States, 191 F. 2d Supp. No. 1, 184;

Forster v. Insurance Co. of North America, 139 F. (2d) 875.

Forster v. Insurance Co. of North America, supra, 877, is not in point. In the *Forster* decision the Court stated "there was no issue of fact to submit to a jury". In this case now before the Court there are many issues of fact to submit to the jury such as whether the premises in question was a hotel, whether the alleged violations were wilful and the amount of the overcharges. It is also doubted whether *Orenstein v. United States,* supra, is in point as in that case,

unlike this one, the trial Court granted no legal relief. To quote from the Court, *Orenstein v. United States,* supra, at page 193:

> "Though the defendant was entitled to a jury trial with respect to the cause of action for damages under Section 205, the court's denial of such jury trial became harmless error, since the eventual judgment awarded no damages to the plaintiff on this cause of action."

It is true that federal Courts have come to contrary decisions over the right to have a jury trial where identical legal and equitable issues are presented in the same case. Some Courts hold that there is no absolute right to have the common issue heard by the jury, and therefore if the trial Court rules improperly that there is no jury issue involved, its ruling is not prejudicial since even if the trial Court had found a right to trial by jury it could have heard the common issue as a Court matter. This appears to be the rule that would have been applied in *Orenstein v. United States,* supra, if the issue had been presented.

It is respectfully submitted that such a rule is contrary to the meaning and intent of Rules 38 (a) and 39 (a) of the Federal Rules of Civil Procedure. Rule 39 (a) provides:

> "Trial By Jury Or By Court. (a) When trial by jury has demanded as provided in Rule 38, the action shall be designated upon the docket as a jury action. The trial of all issues so demanded shall be by jury * * *."

Many Courts, including this Court, recognize the requirement of these rules to have the common issue tried by jury.

Bruckman v. Hollzer, 152 F. (2d) 730, 732-733.

In *Bruckman v. Hollzer,* supra, at pages 732, this Court stated the rule to be followed in this Circuit:

> "Plaintiff contends that whether or not the Di Menna case states the law prior to the adoption of the Federal Rules of Civil Procedure, those rules now give to the party having a claim triable by jury at common law the power to preserve that right when that claim is joined with other equitable issues involving one of the issues of fact in the common law suit. If this contention be correct, it is obvious that, since the right issue of infringement is common to all three sets of transactions, the right of jury trial on the common law transaction may be preserved only if the court is required to try the common issue so that judgment on the verdict is entered before the equitable claims are decided. This is the view held by Judge Moscowitz in Elkins v. Nobel, 1 F.R.D. 357, 358, and Judge Conger in Dellefield v. Blockdel Realty Co., D.C., 1 F.R.D. 689, 690.
>
> "We agree with these judges that the Federal Rules of Civil Procedure make such a preservation of the demanded right of jury trial and that to that end the trial judge is required to try and determine that issue before the others. The rules introduce the radical change in federal practice of creating the jurisdiction in the District Courts to hear and determine in a single suit equity

> claims, with a claim which theretofore could have a common law adjudication in a separate suit. We take it that it is to 'preserve' in the suit provided by the rules the common law adjudication by jury trial existing in a separate suit when such a claim is joined with equitable claims having a common issue of fact, that Rule 38 (a) provides: '(a) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.' "

Appellee did not discuss *Bruckman v. Hollzer,* supra, in connection with its first point but stated on page 15 of its brief in connection with the second point: "With these principles and authorities in mind, a case such as Bruckman v. Hollzer, 152 F. 2d 730 (C.A. 9) is clearly distinguishable. In the Bruckman case a private party sought to enforce a private right." In regard thereto, it must be pointed out that the United States sought to enforce a public right in this Court's decision of *Connolly v. United States,* 149 F. (2d) 666, 669, and there is no indication that the Court felt that such was any bar to its recognition of the defendant's right to a jury trial.

It is hard to conclude anything other than appellee should not profit by the error which it urged upon the trial Court, for it was appellee who urged the trial Court to "put the cart before the horse", quoting from page 7 of appellee's brief.

II.

Appellee's second point is that in any event appellant was not entitled to a jury trial. The question has been recently passed upon by the United States Court of Appeals for the First Circuit on July 25, 1951, in *Orenstein v. United States,* supra, 191 F. 2d Supp. No. 1, 189-190. After a full discussion of the question in the *Orenstein* decision, the Court concluded at page 190:

> "Thus we think it clear that, if the present complaint by the United States had been solely for treble damages under Section 205 of the Act, the defendant would have been entitled as of right to demand a jury trial. See accord, 35 Minn. 1 Rev. 304 (1951). This separate and distinct cause of action for damages in the nature of penalty does not lose its character as an action at law, and become merely an 'equitable adjunct,' by reason of being joined in a single complaint with another cause of action of an equitable nature under Section 206(b) of the Act. See the discussion by Judge Ford in United States v. Stymish, 86 F. Supp. 999 (D.C. Mass. 1949)."

It is, however, contended that *National Labor Relations Board v. Jones and Laughlin Steel Corp.,* 301 U.S. 1, 48, is authority to the effect that appellant is not entitled to a jury trial in this cause. Similarly cited by appellee is *National Labor Relations Board v. Williamson-Dickie Manufacturing Co.,* 130 F. (2d) 260. We respectfully submit that these decisions are not in point. In *N.L.R.B. v. Jones and Laughlin Steel Corp.,* supra, the Supreme Court dealt with the

question whether Congress could create an administrative agency with limited original jurisdiction over fact finding without violating the Seventh Amendment to the Constitution. To quote from the decision at page 48 as was done in appellee's brief at pages 11-12:

> "The instant case is not a suit at common law or in the nature of such a suit. The proceeding is one unknown to the common law. It is a statutory proceeding."

We do not have here an administrative proceeding. This case arose in a federal District Court which exercises true judicial power as distinguished from quasi-legislative and quasi-judicial functions. The type of proceeding provided for and the jurisdiction granted to the federal District Courts under the Housing and Rent Act of 1947 are familiar to the common law, but the type of proceeding of and the jurisdiction exercised by the National Labor Relations Board, as was pointed out in the *Jones and Laughlin Steel* case, are unknown to the common law. In *Orenstein v. United States,* supra, 189-190, the Court considered the nature of an action under Section 205 of the Housing and Rent Act of 1947 and found it one which would fall within the well-recognized forms of action of the common law.

> " 'Actions which at common law would fall within well-recognized forms of action, and which are not complicated by equitable defenses are jury action if demand for jury is made.' 3 Moore's Fed. Practice p. 3010. A tenant's action

under Section 205 of the Housing and Rent Act of 1947, seeking recovery of liquidated damages by way of compensation for injury suffered by him individually, would, under the common law forms of action, have been enforced by an action on the case; and therefore the defendant in such a complaint would be entitled to a jury trial. If the United States brings the action for damages under Section 205, in default of suit by the tenant within 30 days of the date of violation, it is seeking 'damages in the nature of penalties' (328 U.S. at 401-402), an added sanction in the public interest in aid of effectuating the purposes of the Act. Such an action by the United States to recover a statutory penalty would be enforced, under the earlier forms of action at common law, by an action of debt. In Hepner v. United States, 213 U.S. 103, 115 (1909), in an action of debt brought by the United States to recover a penalty imposed by the Alien Immigration Act of 1903, the Court recognized that the defendant had the constitutional right to have a jury pass upon any triable issues of fact. The defendant is entitled to a jury trial of an action brought under Section 205 of the Housing and Rent Act, notwithstanding that the cause of action is based upon an Act of Congress. Not only is this clear from cases involving suits for statutory penalties but as a further instance it is well settled that in actions for treble damages under the Sherman Act, 15 U.S.C. 15, the defendant is entitled to a jury trial. Fleitmann v. Welsback Street Lighting Co., 240 U.S. 27 (1916); Ping v. Spina, 166 F. 2d 546 (C.A. 2d, 1948). See also Arnstein v. Porter, 154 F. 2d 464, 468 (C.A. 2d 1946); United States

> v. Jepson, 90 F. Supp. 983 (D.C. N.J. 1950). Likewise it has been held that in an action by an employee under Section 16(b) of the Fair Labor Standards Act of 1938 to recover overtime compensation and a like amount as liquidated damages, the parties are entitled as of a right to a jury trial, though the statute itself is silent on the point. *Olearchick v. American Steel Foundries,* 73 F. Supp. 273 (D.C. Pa. 1947)."

Likewise *Block v. Hirsh,* 256 U.S. 135, cited by appellee in his brief at page 10, does not involve an action or suit in a federal District Court but rather an administrative proceeding. *Guthrie National Bank v. City of Guthrie,* 173 U.S. 528, is not in point, cited at page 11 of appellee's brief. The Guthrie decision involves the right of a state or territory to create non-legal obligations on the part of its subdivisions under a claims procedure not providing for jury trial, page 537 of the decision. We do not dispute the sovereign's right to exercise such a power but that issue is not here involved.

Appellee makes one further contention at page 15 of his brief which is that no penalty is here involved. In view of *Porter v. Warner Holding Co.,* 328 U.S. 395, 401-402, which was not discussed by appellee, this position is untenable. Furthermore, appellee's citations that Section 205 of the Housing and Rent Act of 1947 and Section 205(e) of the Emergency Price Control Act of 1942 are not criminally penal are not in point for the question here is whether a civil penalty is involved and that question was de-

termined by *Porter v. Warner Holding Co.*, supra, at page 402:

> "It establishes the sole means whereby individuals may assert their private right to damages and whereby the Administrator on behalf of the United States may seek damages in the nature of penalties. Moreover a court giving relief under Section 205(e) acts as a court of law."

And if the action is for "liquidated damages", which it is respectfully submitted it is not, *Porter v. Warner Holding Co.*, supra, it still is a matter which historically would be for the sole and exclusive jurisdiction of a common law court.

CONCLUSION.

For the reasons heretofore stated the judgment and decree herein should be reversed with direction that those issues affecting the legal claim be first tried by jury before any judgment or decree shall be herein rendered.

Dated, San Francisco, California,
October 24, 1951.

Respectfully submitted,
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